

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

<b>TITO REYES,</b>	)	
<b>Plaintiff,</b>	)	<b>C.A. No. 08-72 Erie</b>
	)	
<b>v.</b>	)	<b>District Judge McLaughlin</b>
	)	<b>Magistrate Judge Baxter</b>
<b>MICHAEL BARONE, et al.,</b>	)	
<b>Defendants.</b>	)	

**MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

**I. RECOMMENDATION**

\_\_\_\_\_ It is respectfully recommended that:

1. Defendant Maxa’s Motion to Dismiss Plaintiff’s Complaint, or in the alternative, Motion for Summary Judgment [Document # 9] be granted; and
2. The Motion to Dismiss Complaint filed by Defendants Barone and Sobina [Document # 24] be granted..

**II. REPORT**

**A. Relevant Procedural and Factual History**

On March 13, 2008, Plaintiff Tito Reyes, a prisoner incarcerated at the State Correctional Institution at Forest in Marienville, Pennsylvania (“SCI-Forest”), commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Named as Defendants are: Michael Barone, Deputy Superintendent at SCI-Forest (“Barone”); Raymond Sobina, Superintendent at SCI-Forest (“Sobina”); and Dr. Robert Maxa, a physician under contract to perform medical services for inmates at SCI-Forest (“Maxa”).

Plaintiff alleges that Defendants were deliberately indifferent to his serious medical needs in violation of his Eighth and Fourteenth Amendment rights, and were medically negligent in failing to provide adequate medical care. In particular, Plaintiff claims that Defendants failed to give him appropriate medical care after he had surgery to remove bilateral cataracts and that, as a result, he lost the vision in his right eye. (Document # 27, Plaintiff’s

Response, at p. 1). As relief for his claims, Plaintiff seeks monetary damages. (Complaint at Section VI).

On May 16, 2008, Defendant Maxa filed a motion to dismiss, or in the alternative, motion for summary judgment, arguing that Plaintiff has failed to state a claim upon which relief may be granted. (Document # 9). Subsequently, Defendants Barone and Sobina filed a motion to dismiss, arguing, *inter alia*, that Plaintiff failed to exhaust his administrative remedies.<sup>1</sup> [Document # 24]. Plaintiff has filed a response to both motions, essentially restating and expanding upon the allegations of his complaint. [Document # 27]. This matter is now ripe for consideration.

## **B. Standards of Review**

### **1. Summary Judgment**

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(e) further provides that when a motion for summary judgment is made and supported, “an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” *Id.*

A district court may grant summary judgment for the defendant when the plaintiff has

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Fed.R.Civ.P. Rule 12(b) provides that “[i]f, on a motion ...to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,…” Here, Defendants Barone and Sobina have submitted a declaration and a number of exhibits that this Court has reviewed and considered as part of its determination of Defendants’ motion. As a result, Defendants’ motion to dismiss will be treated as a motion for summary judgment and disposed of in accordance with Rule 56 of the Federal Rules of Civil Procedure.

failed to present any genuine issues of material fact. See Fed.R.Civ.P. 56(c); Krouse v. American Sterilizer Co., 126 F.3d 494, 500 n.2 (3d Cir. 1997). The moving party has the initial burden of proving to the district court the absence of evidence supporting the non-moving party's claims. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Country Floors, Inc. v. Partnership Composed of Gepner and Ford, 930 F.2d 1056, 1061 (3d Cir. 1990). Further, "[R]ule 56 enables a party contending that there is no genuine dispute as to a specific, essential fact 'to demand at least one sworn averment of that fact before the lengthy process of litigation continues.'" Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990) quoting Lujan v. National Wildlife Federation, 497 U.S. 871 (1990).

The burden then shifts to the non-movant to come forward with specific facts showing a genuine issue for trial. Matsushita Elec. Indus. Co. v Zenith Radio Corp., 475 U.S. 574 (1986); Williams v. Borough of West Chester, Pa., 891 F.2d 458, 460-461 (3d Cir. 1989)(the non-movant must present affirmative evidence - more than a scintilla but less than a preponderance - which supports each element of his claim to defeat a properly presented motion for summary judgment). The non-moving party must go beyond the pleadings and show specific facts by affidavit or by information contained in the filed documents (i.e., depositions, answers to interrogatories and admissions) to meet his burden of proving elements essential to his claim. Celotex, 477 U.S. at 322; Country Floors, 930 F.2d at 1061.

A material fact is a fact whose resolution will effect the outcome of the case under applicable law. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986). Although the court must resolve any doubts as to the existence of genuine issues of fact against the party moving for summary judgment, Rule 56 "does not allow a party resisting the motion to rely merely upon bare assertions, conclusory allegation or suspicions." Firemen's Ins. Co. of Newark, N.J. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Summary judgment is only precluded if the dispute about a material fact is "genuine," i.e., if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson, 477 U.S. at 247-249.

## **2. Pro Se Pleadings**

*Pro se* pleadings, “however inartfully pleaded,” must be held to “less stringent standards than formal pleadings drafted by lawyers” Haines v. Kerner, 404 U.S. 519, 520-521(1972). If the court can reasonably read pleadings to state a valid claim on which the litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant’s unfamiliarity with pleading requirements. Boag v. MacDougall, 454 U.S. 364 (1982); United States ex rel. Montgomery v. Bierley, 141 F.2d 552, 555 (3d Cir. 1969)(petition prepared by a prisoner may be inartfully drawn and should be read “with a measure of tolerance”); Smith v. U.S. District Court, 956 F.2d 295 (D.C.Cir. 1992); Freeman v. Department of Corrections, 949 F.2d 360 (10th Cir. 1991). Under our liberal pleading rules, a district court should construe all allegations in a complaint in favor of the complainant. Gibbs v. Roman, 116 F.3d 83 (3d Cir.1997). See, e.g., Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996)(discussing Fed.R.Civ.P. 12(b)(6) standard); Markowitz v. Northeast Land Company, 906 F.2d 100, 103 (3d Cir. 1990)(same). Because Plaintiff is a *pro se* litigant, this Court will consider facts and make inferences where it is appropriate.

## **C. Exhaustion**

### **1. Exhaustion Requirement of the Prison Litigation Reform Act**

\_\_\_\_\_The Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a), provides:

no action shall be brought with respect to prison conditions under section 1983 of this title ... by a prisoner confined in any jail, prisons, or other correctional facility *until such administrative remedies as are available are exhausted*.

Id. (Emphasis added).

The requirement that an inmate exhaust administrative remedies applies to all inmate suits regarding prison life, including those that involve general circumstances as well as particular episodes. Porter v. Nussle, 534 U.S. 516 (2002). See also Concepcion v. Morton, 306 F.3d 1347 (3d Cir. 2002) (for history of exhaustion requirement). Administrative exhaustion must be completed prior to the filing of an action. McCarthy v. Madigan, 503 U.S. 140, 144

(1992). Federal courts are barred from hearing a claim if a plaintiff has failed to exhaust all the available remedies. Grimsley v. Rodriguez, 113 F.3d 1246 (Table), 1997 WL 2356136 (Unpublished Opinion) (10<sup>th</sup> Cir. May 8, 1997).<sup>2</sup> The exhaustion requirement is not a technicality, rather it is federal law which federal district courts are required to follow. Nyhuis, 204 F.3d at 73 (by using language “no action shall be brought,” Congress has “clearly required exhaustion”). There is no “futility” exception to the administrative exhaustion requirement. Ahmed v. Dragovich, 297 F.3d 201, 206 (3d Cir. 2002) citing Nyhuis, 204 F.3d at 78.

According to the U.S. Supreme Court, the PLRA requires “proper exhaustion,” meaning that a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines. Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378, 2387-2388 (June 22, 2006) (“Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules ...”). Importantly, the exhaustion requirement may not be satisfied “by filing an untimely or otherwise procedurally defective ... appeal.” Id.

A plaintiff need not affirmatively plead exhaustion, but exhaustion is an affirmative defense which is waived if not properly presented by a defendant. Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002) (holding that “no provision of the PLRA requires pleading exhaustion with particularity,” while construing the PLRA requirements in light of the Supreme Court decision in Swierkiewicz v. Sorema, N.A., 534 U.S. 506 (2002)). It is the burden of a defendant asserting the defense to plead and prove it. Id.

#### **b. Procedural Default Component**

The United States Court of Appeals for the Third Circuit has explicitly held that the exhaustion requirement of the PLRA includes a procedural default component, by analogizing it to the exhaustion doctrine (with its corollary procedural default component) in the habeas

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Importantly, a plaintiff’s failure to exhaust his administrative remedies does not deprive the district court of subject matter jurisdiction. Nyhuis v. Reno, 204 F.3d 65, 69 n.4 (3d Cir. 2000) (“...[W]e agree with the clear majority of courts that § 1997e(a) is *not* a jurisdictional requirement, such that failure to comply with the section would deprive federal courts of subject matter jurisdiction.”).

context. Spruill v. Gillis, 372 F.3d 218, 228-229 (3d Cir. 2004).<sup>3</sup> The Circuit explained:

We believe that Congress's policy objectives will be served by interpreting § 1997e(a)'s exhaustion requirement to include a procedural default component. Based on our earlier discussion of the PLRA's legislative history, [...] Congress seems to have had three interrelated objectives relevant to our inquiry here: (1) to return control of the inmate grievance process to prison administrators; (2) to encourage development of an administrative record, and perhaps settlements, within the inmate grievance process; and (3) to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits. Each of these goals is better served by interpreting § 1997e(a)'s exhaustion language to include a procedural default component than by interpreting it merely to require termination of all administrative grievance proceedings.

Id. Having concluded that the PLRA includes a procedural default component, the Court then indicated that “prison grievance procedures supply the yardstick for measuring procedural default.” Id. at 231.

To exhaust the administrative remedies within the DOC’s grievance system, a grievance must be appealed through all administrative levels of appeal at the inmate’s institution and the DOC inmate-initiated grievances must follow the procedures set forth in Administrative Directive 804 (“DC-ADM 804”), which is included as part of the inmate handbook distributed to each inmate. The first step in the grievance process is for the inmate to file a claim with the institution’s grievance officer. The grievance officer will investigate a grievance and provide the inmate with an Initial Review Response, which includes “a brief rationale, summarizing the conclusions and any action taken or recommended to resolve the issues raised in the grievance.” DC-ADM 804 VI(B)(4). If the inmate is not satisfied with the Initial Review Response, there are two levels of appeal he must pursue to exhaust his claim: (1) an appeal within five days of his receipt of the Initial Review Response to the prison superintendent and, if the appeal is denied, (2) an appeal to the DOC Secretary’s Office of Inmate Grievances and Appeals (“DOC Secretary”). DC-ADM 804 VI(C)(1).

There is a split of authority among the Circuits on this issue. Compare Berry v. Kerik, 366 F.3d 85 (2d Cir. 2004), Ross v. County of Bernalillo, 365 F.3d 1181 (10<sup>th</sup> Cir. 2004), and Pozo v. McCaughtry, 286 F.3d 1022 (7<sup>th</sup> Cir. 2002), with Thomas v. Woolum, 337 F.3d 720 (6<sup>th</sup> Cir. 2003).

**c. Exhaustion and Procedural Default Applied**

Defendant argues that Plaintiff has failed to exhaust his administrative remedies. In support of this assertion, Defendants have submitted the Declaration of Christina Kennedy, Superintendent's Assistant at SCI-Forest, who certifies the following, in pertinent part:

3. I have reviewed inmate Reyes' grievance history. He has filed only one grievance while at SCI-Forest, on January 31, 2008. It was rejected as untimely because it related to work issues from 2006 and 2007. He did not appeal the rejections.
4. Inmate Reyes has never filed a grievance concerning his medical care or treatment.

(Declaration of Christina Kennedy attached as Exhibit B to Document # 24, at ¶¶ 3-4).

Plaintiff has not presented any argument or provided any evidence to contradict this declaration. As a result, this Court finds that Plaintiff failed to exhaust his administrative remedies with regard to the claims raised in this case. Moreover, Plaintiff has procedurally defaulted on his claims. Accordingly, Plaintiff's claims are not properly before this Court and must be dismissed.

**III. CONCLUSION**

For the foregoing reasons, it is respectfully recommended that:

1. Defendant Maxa's Motion to Dismiss Plaintiff's Complaint, or in the alternative, Motion for Summary Judgment [Document # 9] be granted; and
2. The Motion to Dismiss Complaint filed by Defendants Barone and Sobina [Document # 24] be granted..

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a

waiver of some appellate rights. See, e.g., Nara v. Frank, 488 F.3d 187 (3d Cir. 2007).

S/Susan Paradise Baxter  
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SUSAN PARADISE BAXTER  
Chief U.S. Magistrate Judge

Dated: November 25, 2008

cc: The Honorable Sean J. McLaughlin  
United States District Judge